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NO. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE, *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal From The Supreme Court Of Ohio

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

I. Whether, where a statute prohibiting possession or viewing of depictions of nude minors is vague and overbroad, a state supreme court may re-write the statute to bring it within constitutional boundaries and then retroactively apply the new construction to the defendant in the case in which the re-writing was done.

II. Whether a person can, consistent with the constitutional rights of privacy and to receive information, be convicted for private, in-home possession of photographs depicting minors in a state of nudity where the nudity consists of a "lewd exhibition" or "involves a graphic focus on the genitals."

III. Whether a person can, consistent with the First Amendment rights of speech, be convicted for possession of photographs depicting a nude child, where the statute as construed by the state supreme court prohibits possession or viewing of depictions of a nude child that constitute a "lewd exhibition" or involve a "graphic focus on the genitals."

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OPINIONS BELOW

The judgment of the Ohio Supreme Court from which this appeal is taken is its Rehearing Entry issued August 31, 1988 (Joint Appendix [hereinafter J.A.] 55), wherein it refused to reconsider its Judgment Entry issued July 6, 1988, by which it affirmed Appellant Clyde Osborne's conviction. Its Opinion of July 6, 1988, was reported as *State* v. *Young*, 37 Ohio State 3d 249 (1988). (J.A. 37) The opinion of the Ohio Court of Appeals, styled *State* v. *Osborne*, rendered June 10, 1986 (J.A. 25), was not reported.

JURISDICTION

The judgment of the Ohio Supreme Court affirming Appellant's conviction was entered on July 6, 1988. On August 31, 1988, the Ohio Supreme Court denied Appellant's motion for a re-hearing, and on November 10, 1988, Appellant filed his Notice of Appeal to this Court. Appellant filed his Jurisdictional Statement on November 14, 1988, and this Court noted probable jurisdiction on June 16, 1989. Jurisdiction rests on 28 U.S.C. 1257(2), since Appellant draws into question the constitutionality of Ohio Revised Code Section 2907.323(A)(3), under which Appellant is convicted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio Revised Code Section 2907.323(A)(3)

Illegal use of minor in nudity-oriented material or performances.

(A) No person shall do any of the following:

3. Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law;. . .

STATEMENT OF THE CASE

As a result of an investigation in Florida, a Jack Smith allegedly made statements asserting that Appellant Clyde Osborne was in possession of negatives from illegal photographs of children. A warrant to search Mr. Osborne's home was issued. During the search, police discovered Mr. Osborne's personal photograph album in the drawer of a desk in his bedroom. Upon looking through the pages of the album, police found on page 12 three Polaroid photographs and one snapshot. (J.A. 8-11, 14-15; R. 52-55, 66) The police arrested Mr. Osborne and filed a complaint against him for "possess[ing] material that shows a minor . . . in a state of nudity," in violation of Ohio Revised Code Annotated (Page) Section 2907.323(A)(3) (hereinafter O.k.C.). (J.A. 7) Ohio Revised Code 2907.323(A)(3) as written prohibits the possession or viewing of depictions of a "minor" who is "in a state of nudity". It provides certain exceptions to liability,

including possession or viewing by the child's parents, possession with the written consent of the parents, and possession for an artistic purpose. It contains no scienter element. It does not define "minor," and no other statute gives a definition of "minor" applicable to O.R.C. 2907.323(A)(3).

Mr. Osborne entered a plea of not guilty and demanded a jury trial. Immediately prior to trial Mr. Osborne challenged the constitutionality of O.R.C. 2907.323(A)(3) on its face and as applied to him (R. 7), on the grounds that it was "void for vagueness, overbroad, and violates the defendant's right of privacy, and that it would appear to make it illegal to possess any kind of material like that in a person's own home." (R. 3)

Mr. Osborne also moved that the jury be instructed that the word "minor" as used in O.R.C. 2907.323(A)(3) means a person under fifteen. (R. 7) He argued that the word "minor" as used in O.R.C. Chapter 2907 means one under fifteen and cited the trial court to O.R.C. 2907.04, Corruption of a Minor, which defines "minor" for the purpose of engaging in consensual sexual relations as a person under fifteen. (R. 8) The trial court did not rule on the definition of "minor" at that time. (R. 13-14).

At trial the prosecution introduced the three Polaroid photographs and one snap shot into evidence. (J.A. 8-11, 14-15; R. 52-55, 66) Testimony from the police officers who executed the search established that the pictures were taken from Mr. Osborne's home. (J.A. 8-9; R. 51-52) The evidence offered to establish the photographic subject's age was a hearsay statement made to Mr. Osborne and a notation, made by a person unknown, on the back of one of the photographs. (J.A. 9, 13, 17; R. 53, 62, 88)

Mr. Osborne testified that the photographs were given to him "four or five years" before his prosecution by, Jack

Smith. (J.A. 17; R. 86, 88) Mr. Osborne testified that he had assembled the photo album from which the photographs were taken. (J.A. 15; R. 87) He testified that he believed that his friend Jack Smith had taken the photographs (J.A. 17; R. 90) and that Mr. Smith had asked him to keep them. (J.A. 17; R. 89) He testified that he did not know that keeping the photographs was illegal. (J.A. 16; R. 87) The State offered no rebuttal. (R. 99)

Mr. Osborne asked the trial court to instruct the jury that no criminal liability could attach where the material was possessed for a proper purpose or with knowledge that the subject's parents consented to the photography. (R. 103) The trial court refused this instruction. (R. 105) Immediately prior to instructing the jury the court ruled that it would define "minor" as a person under eighteen. (R. 109)

The trial court instructed the jury, consistent with the statutory definition of nudity found in O.R.C. 2907.01(H), that nudity meant the "depiction of human male genitals, pubic area or buttocks with less than a full opaque covering." (R. 120) It defined "minor" as a person under eighteen. (R. 119) It gave no instruction on scienter and defined "possess" in a way that excluded any need to find knowledge or awareness of the character of the item possessed, namely, that "possess" meant "to have, hold, control, or to exercise dominion or custody over a thing or object." (R. 120) The jury returned a verdict of guilty. (R. 125) The trial court sentenced Mr. Osborne to six months incarceration. (R. 130)

The Court of Appeals affirmed Mr. Osborne's conviction. It said that "the United States Constitution does not provide First Amendment protection to a person privately possessing child pornography." (J.A. 28) It held

that nudity under O.R.C. 2907.323(A)(3) includes "only . . . lewd exhibitions of the genitals" and that "nudity-oriented material" refers only to depictions of nudity which are "devoid of any legitimate purpose." (J.A. 29) It accepted the trial court's definition of "minor" as one under the age of eighteen. (J.A. 33)

On review, the Ohio Supreme Court affirmed Mr. Osborne's conviction. It found that O.R.C. 2907.323(A)(3) was "not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (J.A. 42) Noting that this Court's decision in *New York* v. *Ferber*, 458 U.S. 747, 764 (1982), required that the conduct prohibited "must be adequately defined by the applicable state law, as written *or authoritatively construed*" (the emphasis is the Ohio Supreme Court's), the court said:

> As we construe it today, R.C. 2907.323(A)(3) prohibits the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged. (J.A. 42)

The court ruled that there was no error in the fact that the jury had not been instructed on the new definition of nudity since Mr. Osborne had not requested such an instruction. (J.A. 54) It did not explain how Mr. Osborne was to know at trial what definition of nudity would later be devised. The possession prohibited by the statute, the court said, must be for "prurient purposes" and not "morally innocent." (J.A. 42) The court noted that O.R.C. 2907.323(A)(3) "does not specify any element of scienter" but found that it did not "plainly indicat[e] a purpose to impose strict liability." (J.A. 44) The court then applied

O.R.C. 2901.21(B), which makes recklessness the culpable mental state when a statute fails to require proof of a culpable mental state and it is not clear that the legislature intended to impose strict liability. The court amended the statutory definition of recklessness, O.R.C. 2901.22(C), to require proof "that the defendant had some notice of the character of the material possessed" and that he was "on notice as to the illicit character of the material." (J.A. 45) The court found that there was no error in the fact that the jury was not instructed on the requisite mental state because Mr. Osborne's requested jury instructions were "completely silent on the element of scienter." (J.A. 46) In fact, Mr. Osborne requested that the jury be instructed that criminal liability did not attach if his possession was for one of the statutory "proper purposes." (R. 103-107) The court itself noted that these "proper purposes" make clear that the possession prohibited under the statute is one that is "*not* morally innocent" and is "for prurient purposes". (J.A. 42) The court did not mention the fact that neither the trial court nor prosecutor had said that a culpable mental state was required. It did not explain how Mr. Osborne was to foresee what would turn out to be the correct jury instruction on scienter. The court said that a conviction for private possession of the materials regulated by O.R.C. 2907.323(A)(3) does not violate the right to privacy. (J.A. 40) It affirmed that "minor" means a person under eighteen. (J.A. 43)

Mr. Osborne moved for a re-hearing in the Ohio Supreme Court, reiterating his previous assertions concerning his right to privacy and the unconstitutionality of O.R.C. 2907.323(A)(3). He argued that, even with the new elements added by the court, O.R.C. 2907.323(A)(3) was substantially overbroad and vague. He also argued

that in affirming his conviction on the basis of new offense elements that were not before the trial court, the Ohio Supreme Court had violated his right to have these elements presented in a trial court where he could answer the charges made against him. The court denied this motion (J.A. 55)

SUMMARY OF ARGUMENT

The statute under which Appellant Clyde Osborne was charged and convicted is part of a comprehensive set of provisions in O.R.C. Chapter 2907 that regulate the production, sale, distribution, and possession of materials involving depictions of minors. These provisions govern a continuum of materials depicting minors, extending from the obscene, to non-obscene sexual activity, to mere nudity. Ohio Revised Code 2907.321 prohibits the knowing creation, sale, distribution, or possession of "obscenity involving a minor." Ohio Revised Code 2907.322 prohibits the knowing creation, sale, distribution, or possession of depictions of a minor engaging in sexual activity (any sexual touching of another person), masturbation, or bestiality. Ohio Revised Code 2907.323, the provision before this Court, prohibits the creation, consent to creation, possession, or viewing of depictions of a child "in a state of nudity."

Mr. Osborne was convicted under the possession/viewing subsection of O.R.C. 2907.323, which is O.R.C. 2907.323(A)(3), for possessing four photographs that depict a minor in a state of nudity. He challenged the constitutionality of O.R.C. 2907.323(A)(3) in the trial court and on appeal. On review, the Ohio Supreme Court construed "nudity" to be nudity that constitutes a "lewd exhibition" or "involves a graphic focus on the genitals." It added an element of scienter, "recklessness," as the culpable mental state required for conviction and affirmed the lower courts' determinations that a "minor" is a person under eighteen. Having thus re-written O.R.C. 2907.323(A)(3) in an effort to meet constitutional standards, the court affirmed Mr. Osborne's conviction.

On three grounds Appellant Clyde Osborne asks this Court to reverse the Ohio Supreme Court's affirmance of his conviction.

First, by affirming Mr. Osborne's conviction, obtained under a statute unconstitutional for its invasion of First Amendment rights, the Ohio Supreme Court denied Mr. Osborne his right to due process. A facially overbroad statute is invalid and cannot be revised by a court and applied to acts done prior to the judicial revision. *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2639-2640 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Thornhill* v. *Alabama*, 310 U.S. 88, 96 (1940). To convict in such a situation violates due process since it constitutes an *ex post facto* application of what in effect is a judicially created penal prohibition. *Bouie* v. *Columbia*, 378 U.S. 347 (1964). Since there was no valid statute prohibiting Mr. Osborne's conduct at the time he acted, he was not warned that his conduct could be illegal and he may not be punished for that conduct. Further, since the Ohio Supreme Court affirmed his conviction on the basis of offense elements other than those used at trial, Mr. Osborne stands convicted of an offense for which he was not tried. *Cole* v. *Arkansas*, 333 U.S. 196 (1948). He had no opportunity to defend himself, because at trial he did not know that new elements would be added or what they might be.

Second, since Mr. Osborne's possession of the photographs occurred in his home, it is protected by his right

of privacy and his right to receive information. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). There was no allegation or evidence that Mr. Osborne had an intent to distribute the photographs. For personal use, an individual may possess photographs in his home, even if they are not constitutionally protected. The privacy right applies to the non-obscene depictions involved in this case as much as to the obscene material involved in *Stanley* v. *Georgia*. The right to receive information protects private, in-home possession of communicative materials regardless of their worth.

The materials regulated by O.R.C. 2907.323(A)(3) are not child pornography as it is defined in *New York* v. *Ferber*, 458 U.S. 747 (1982). Assuming, *arguendo*, that they are, however, Ohio does not have a compelling interest in prohibiting their private, in-home possession. Ohio has a compelling interest in protecting its children from being used in child pornography, and this interest allows it to prohibit the production and commercial distribution of child pornography. *Ferber*, 458 U.S. at 756-757. But the prohibition of private, in-home possession is not sufficiently related to combating the child pornography industry to warrant infringing Mr. Osborne's fundamental rights of speech and privacy.

Third, even as re-constructed by the Ohio Supreme Court, O.R.C. 2907.323(A)(3) is unconstitutionally vague and overbroad. It still prohibits possession of materials protected by the First Amendment and is not narrowly tailored to serve a compelling state interest. In *Ferber*, this Court said that child pornography may be regulated to "prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 753. Ohio Revised Code 2907.323(A)(3) does not regulate child pornography because it does not require

that sexual conduct be depicted or that commercial production or distribution be involved.

Ohio Revised Code 2907.323(A)(3) regulates depictions of mere nudity, with the gloss put on that term by the Ohio Supreme Court. Photographs that are obscene or involve sexual activity are regulated by other statutes. O.R.C. 2907.321; O.R.C. 2907.322. Depictions of mere nudity, even of children, are protected by the First Amendment. *Ferber*, 458 U.S. at 765 n. 18.

This Court found that there is harm in the commercial distribution of depictions of children who have been posed in performances involving sexual conduct. It said that the posing of children in this fashion constituted child abuse. *Ferber*, 458 U.S. at 757. Ohio Revised Code 2907.323(A)(3) is not directed against this harm, because not only does it not require that sexual conduct be depicted but also because it does not require a performance or a posing. It thus is not narrowly directed against the child pornography industry.

Ohio Revised Code 2907.323(A)(3) is not limited in its application to commercial material. In *Ferber* this Court found that the children used in child pornography are harmed by the subsequent distribution in commerce of the pornographic materials, first because commercial distribution means that the depictions are widely circulated, and second because if there were no market for the depictions, the producer would have no incentive to make them. *Ferber*, 458 U.S. at 759-61. Ohio Revised Code 2907.323(A)(3) is not narrowly tailored to eliminate this harm. It does not require that the depictions be commercially produced or distributed. Rather, it prohibits mere possession or viewing. Material possessed for private use is not in commercial circulation. A viewing does not

require even possession. A person might view material belonging to another, or displayed in such a way that he views it inadvertently.

Finally, O.R.C. 2907.323(A)(3) does not serve a compelling interest to protect children because it includes three exceptions that permit possession or viewing by the child's parents, by anyone with the written consent of the child's parents, or for an artistic purpose. If the possession or viewing of this material is harmful to children, it serves no reasonable state interest to permit possession or viewing by the child's parents, or with the consent of his parents, or for an artistic purpose. These exceptions cast doubt on the compelling nature of Ohio's asserted interest because they permit possession or viewing of the regulated materials in many situations. Ohio Revised Code 2907.323(A)(3) is thus an underinclusive regulation. *Ferber*, 458 U.S. at 765. *Florida Star* v. *B. J. F.*, 491 U.S. ___, 109 S. Ct. 2603, 2612-2613 (1989).

ARGUMENT

Introduction

The violations of Mr. Osborne's rights addressed in Part I of the Argument arise from his conviction under a facially invalid statute and from the retroactive application to him of a judicial re-construction of that statute. Part II addresses the violation of Mr. Osborne's rights to privacy and to receive information, which resulted from his conviction for possessing photographs in his own home. Part III demonstrates that O.R.C. 2907.323(A)(3), even as construed by the Ohio Supreme Court below, is unconstitutionally overbroad on its face and as applied to Mr. Osborne, since it invades First Amendment rights without serving a compelling state interest.

I. A FACIALLY INVALID STATUTE THAT PROSCRIBES FIRST AMENDMENT ACTIVITY IS UNENFORCEABLE AND CANNOT BE CONSTRUED AND THEN APPLIED TO CONDUCT WHICH OCCURRED PRIOR TO THE CONSTRUCTION.

Retroactive application of a judicial construction of a facially invalid criminal statute that regulates First Amendment activity violates due process.

A. It punishes for conduct that was not illegal at the time done.

B. It penalizes the defendant for activity that he was not warned could result in criminal charges.

C. Where the construction is made only on appeal and is used to affirm, it leaves the defendant convicted of a crime for which he received no hearing and was thereby denied all the rights that attach in a criminal proceeding.

Each of these problems is present in the instant case.

A. Ohio Revised Code 2907.323(A)(3) Was Unconstitutional On Its Face Due To Its Infringement Of First Amendment Rights. Such A Statute Is Invalid And Has No Legal Effect, And A Conviction Obtained Under It Is Invalid.

No criminal statute may be given legal effect if it violates the guarantees of the United States Constitution. U.S. Const. amend. XIV, sec. 1. When a statute is invalid on its face for its vague or overbroad regulation of First Amendment activity, it has no effect, and no one can be penalized under it for acts which occurred prior to a constitutionalizing construction. An act, even if constitutionally unprotected, is not unlawful if no valid statute proscribes it.

Ohio Revised Code 2907.323(A)(3) as enacted and as applied at the time of Mr. Osborne's conviction was facially

invalid. It prohibited the possession or viewing of depictions of child nudity, where there was a "showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered make genitals in a discernibly turgid state." O.R.C. 2907.01(H). This definition does not require that the minor be post-pubertal, and thus O.R.C. 2907.323(A)(3) included even pictures of naked babies on bear skin rugs. Depictions of nudity are protected speech. U.S. Const. amend. I. In *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213 (1975), this Court noted that "a picture of a baby's buttocks" is protected material, and in *New York* v. *Ferber*, 458 U.S. 747 (1982), it said that "nudity, without more is protected expression." *Ferber*, 458 U.S. at 765 n. 18. Ohio Revised Code 2907.323(A)(3) restricted this speech activity without requiring proof of knowledge or notice on the part of the possessor or viewer of the character of the material, thereby violating due process. *Smith* v. *California*, 361 U.S. 147, 152-155 (1959); *Ferber*, 458 U.S. at 765.

The Ohio Supreme Court attempted a "saving" construction by re-defining nudity, adding scienter, and defining "minor." It then applied that construction to affirm Mr. Osborne's conviction.

Since O.R.C. 2907.323(A)(3) was invalid, Mr. Osborne had no obligation to comply with it. Citizens are not obliged to comply with an invalid statute. Where the Constitution does not require compliance, a conviction cannot stand. In *Lovell* v. *Griffin*, 303 U.S. 444 (1938), an ordinance which prohibited the distribution of any kind of literature without a permit was facially invalid. This Court said, "As the ordinance is invalid on its face, it was

not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." *Lovell*, 303 U.S. at 452-453; *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940). In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), an ordinance required a permit to hold a parade, procession, or demonstration. Since the ordinance set no standards for issuance of the permit, this Court declared it invalid. It said that "a person faced with an unconstitutional licensing law may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151. It is the validity of the statute and not the nature of the accused's conduct that determines whether a crime has been committed.

This was recognized last term in *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2639 (1989) (Scalia and Blackmun, JJ., concurring in the judgment in part and dissenting in part; joined by Brennan, Marshall, and Stevens, JJ., dissenting). Oakes was convicted under an overbroad statute, but while his appeal was pending in this Court the Massachusetts legislature amended it and eliminated the overbreadth. Justice Scalia noted that this Court has "the power to adopt a rule of law which says that the defendant's acts were lawful because the statute that sought to prohibit them was overbroad and therefore invalid." *Oakes*, 109 S. Ct. at 2640. Justices Brennan, Marshall, and Stevens joined in this proposition, saying that "a State cannot salvage a criminal conviction under a law found to be overbroad, or safeguard its right to prosecute under a law challenged as overbroad, by curing the statute's adjudicated or alleged infirmity prior to review of that conviction or ruling of statutory invalidation by the highest reviewing court." *Oakes*, 109 S. Ct. at 2642 n. 1.

The position articulated by Justice Scalia recognizes the fundamental unfairness of holding a litigant criminally

liable under a statute that cannot pass constitutional muster. If the Constitution means anything, it must invalidate criminal statutes that do not comport with it. If a statute does not have to be constitutional to be enforceable, there is no limit on a state's power to impose criminal sanctions. This Court has long recognized the invalidity of overbroad statutes. *Thornhill* v. *Alabama*, 310 U.S. 88, 96 (1940); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969). This approach has the added benefit of eliminating the statute's "chilling effect" as early as possible by allowing the first person to be prosecuted the opportunity to challenge the statute regardless of whether his own conduct might be legally proscribable under a properly drafted statute. It also provides a legislative incentive to draft statutes narrowly so that they do not invade precious First Amendment rights. A rule to the contrary would make drafting overbroad statutes "cost free." *Oakes*, 109 S. Ct. at 2639-2640.

B. Ohio Revised Code 2907.323(A)(3) Gave No Fair Warning That It Prohibited The Conduct Later Identified By The Ohio Supreme Court As Illegal When It Re-Wrote The Statute In Mr. Osborne's Case.

A conviction under an invalid statute cannot subsequently be made good even if a court hearing the case gives the statute a construction that cures its constitutional infirmity. To sustain a conviction in such a situation penalizes a person for conduct that he was not warned could be illegal at the time he acted. No one is required to guess at what possible constitutionalizing construction might be given an invalid statute.

> An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering

> his activities as disclosed by the charge and evidence introduced against him. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

Thornhill v. *Alabama*, 310 U.S. 88, 98 (1940)(citations omitted).

Statutes must "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), quoting *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). A facially invalid statute gives no warning of what future interpretation may be made in order to save it. Mr. Osborne could not have guessed and was not required to guess at what elements might be added to O.R.C. 2907.323(A)(3). He was not warned by the statutory language what conduct might legally be prohibited in the future.

The Ohio Supreme Court, by adding an element of scienter, defining "minor," and re-writing the definition of nudity to mean "lewd exhibitions" or depictions with a "graphic focus on the genitals," re-wrote O.R.C. 2907.323(A)(3). When it applied this re-written statute to Mr. Osborne's prior conduct, it violated his right to due process just as if the Ohio legislature had enacted a criminal statute and applied it retroactively. Justice O'Connor has noted "that the amendment of a statute pending appeal to eliminate overbreadth is not different, in terms of applying the new law to past conduct, from a state appellate court adopting a limiting construction of a statute to cure overbreadth." *Massachusetts* v. *Oakes*, 491 U.S. ___, 109 S. Ct. 2633, 2638 (1989)(plurality opinion).

Although the Ex Post Facto Clause has been applied only to legislative enactments, "the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties," makes it a deprivation of due process to apply post-conviction judicial constructions to pre-construction conduct. *Marks* v. *United States*, 430 U.S. 188, 191 (1977). In *Calder* v. *Bull*, 3 Dallas 386 (1798), this Court defined *ex post facto* laws as:

> 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, 3 Dallas at 390-391.

The retroactive application of a judicial construction is equally unjust and oppressive, and for that reason, (1) a conviction had under an invalid statute cannot be validated by a "saving" construction of the statute, (2) a conviction wrongly obtained under a valid statute cannot be sustained by a construction that expands criminal liability to include the facts of the case, and (3) under these principles Mr. Osborne cannot be convicted on the basis of the new elements added to O.R.C. 2907.323(A)(3) by the Ohio Supreme Court.

1. A Conviction Under An Invalid Statute Cannot Be Saved By Re-Writing The Statute To Meet Constitutional Requirements And Applying The New Construction Retroactively.

Retroactive application of a constitutionalizing construction of an invalid statute violates due process. In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), this Court held that where a state supreme court gives a "saving" construction to a facially invalid statute, the conviction in the case before it must be overturned. A Birmingham parade-permit ordinance gave city officials broad discretion to deny a permit on consideration of "the public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 148. Shuttlesworth conducted a parade without a permit and was convicted under the ordinance. On Shuttlesworth's appeal the Alabama Supreme Court for the first time construed the ordinance to permit a denial only on "time, place, and manner" considerations and upheld Shuttlesworth's conviction by applying this new construction to him. *Shuttlesworth*, 394 U.S. at 154. This Court said that the new construction made the ordinance constitutionally valid, but characterizing the construction as "a remarkable job of plastic surgery upon the face of the ordinance," *Shuttlesworth*, 394 U.S. at 153, it stated:

> It does not follow . . . that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written.

Shuttlesworth, 394 U.S. at 155.

At the time Shuttlesworth acted, the ordinance was being applied by Birmingham officials as written, not as

subsequently construed by the Alabama Supreme Court. *Shuttlesworth*, 394 U.S. at 158. Therefore, said this Court, "[i]t would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." *Shuttlesworth*, 394 U.S. at 156.

This Court applied the same reasoning in *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), to declare invalid a Kentucky statute that regulated First Amendment activity. It said:

> [W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.

Ashton, 384 U.S. at 198, citing *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965).

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), this Court said that a "saving" construction cannot be applied retroactively unless "such application affords fair warning to the defendants." *Dombrowski*, 380 U.S. at 491 n. 7. There, persons charged under criminal statutes in Louisiana argued that the statutes were vague and overbroad, in violation of the First Amendment. This Court granted their requested injunctive relief, stating that "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution *prior to* a construction adequate to save the statute." (Emphasis supplied.) *Dombrowski*, 380 U.S. at 492. This was again recognized in *Massachusetts* v. *Oakes*, 491 U.S. ____, 109 S. Ct. 2633 (1989), which involved a conviction under a

statute that prohibited the production of photographs of nude children. Justice O'Connor, citing *Dombrowski*, noted that subsequent constructions of a statute, whether by legislative enactment or judicial interpretation, may only be applied to the complaining defendant where there was "fair warning" that his conduct was criminal at the time performed. *Oakes*, 109 S. Ct. at 2638 (plurality opinion).

When First Amendment activity is prohibited by a facially invalid statute, the statute should not stand in the way of any speech activity. Those who engage in such activity should not fear that a subsequent re-writing of the statute to limit its application to unprotected activity will criminalize their formerly legal conduct. A rule to the contrary would allow the facially invalid statute to chill all activity which falls within its ambit. The need to keep invalid statutes from chilling speech is the basis of the rule that one who challenges a penal statute for overbreadth need not himself have engaged in protected speech. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). Mr. Osborne's invalid conviction cannot be "resuscitated" by the judicial construction rendered in his case.

2. A Conviction May Not Be Based On The Retroactive Application Of A Statutory Construction Which Expands Criminal Liability.

Construing an invalid statute to make it valid has the same expansive effect as does construing a valid statute to add new conduct to its proscriptions. In both cases conduct formerly legal is made illegal. In both cases, the penalized conduct occurs before the prohibited conduct is defined. This Court has consistently found that an expansion of a valid statute by a state court violates due process if the court applies that construction in the case before it.

In *Bouie* v. *Columbia*, 378 U.S. 347 (1964), Bouie was convicted under a South Carolina trespass statute for refusing to leave a lunch counter after being ordered to so by its manager. The statute had previously been construed to prohibit only an entry following notice not to enter. The South Carolina Supreme Court, in hearing Bouie's appeal, said that the statute also applied to a refusal to leave after being ordered to leave and affirmed Bouie's conviction. This Court reversed, finding the application to Bouie of an expansive construction analogous to *ex post facto* legislation, hence a denial of due process. *Bouie*, 378 U.S. at 353-354.

In *Rabe* v. *Washington*, 405 U.S. 313 (1972), the accused was convicted of exhibiting obscenity for showing a film at his drive-in theater. The Washington Supreme Court concluded that the film was not obscene but upheld the conviction, stating that the film was obscene "in the *context* of its exhibition," namely at a drive-in theater where persons other than patrons might view it. *Rabe*, 405 U.S. at 315. That decision expanded the scope of liability by allowing conviction for showing materials that were not obscene in themselves, but obscene because of the location in which they were shown. This Court said:

> The statute under which petitioner was prosecuted . . . made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

Rabe, 405 U.S. at 315.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court held that the obscenity standards enunciated in *Miller* v. *California*, 413 U.S. 15 (1973), which expanded

obscenity liability, could not be applied against an accused whose act occurred prior to that ruling because it denied the accused fair warning of the conduct prohibited. *Marks*, 430 U.S. at 196.

3. Because Mr. Osborne Has Been Subjected To A Retroactive Application Of A Statutory Construction Which Added New Elements To O.R.C. 2907.323(A)(3), His Conviction Must Be Reversed.

Mr. Osborne did not have fair warning at the time he acted that his conduct could be illegal. No new construction of a statute can change that fact. A statute which imposes criminal liability must give notice of what is prohibited in order that those subject to its regulation may conform their conduct to it and thus avoid its sanctions. When a statute fails in this regard, no one may be punished for having failed to guess at its meaning. Under the reasoning of this Court's many decisions requiring fair notice before criminal liability may attach, Mr. Osborne's conviction cannot stand.

Bouie, *Rabe*, and *Marks* involved valid statutes expanded by judicial construction in the accused's case and applied against him in the expanded form. In the case at bar, O.R.C. 2907.323(A)(3) as enacted by the Ohio legislature was invalid. Adding new elements to an invalid statute to make it valid has the same expansive effect as does adding new elements to a valid statute.

The instant case is like *Shuttlesworth*, *Ashton*, and *Dombrowski*, in that it involves an invalid statute. The Ohio Supreme Court performed "plastic surgery." *Shuttlesworth*, 394 U.S. at 153, to make of O.R.C. 2907.323(A)(3) something quite different from what had been enacted by the Ohio legislature. It took a statute prohibiting depictions of nudity and changed it to one

prohibiting possession of depictions that constitute a "lewd exhibition" or involve a "graphic focus on the genitals" and appeal to prurient interest, where the possession is not morally innocent. It added a scienter element, and defined "minor" differently from the definition used in the rest of O.R.C. Chapter 2907. Ohio Revised Code 2907.323(A)(3) as construed bears little resemblance to the statute under which Mr. Osborne was charged and convicted.

As with the ordinance in *Shuttlesworth*, the administering authorities "thought [it] meant exactly what it said." *Shuttlesworth*, 394 U.S. at 158. The complaint filed against Mr. Osborne by a Columbus, Ohio, police officer lacked any allegation of scienter and charged that the photographs possessed depicted mere nudity. (J.A. 7) Appellee's counsel, the City Attorney of Columbus, Ohio, did not suggest to the trial court that it charge the jury that Mr. Osborne must have been aware of, or had notice of, the character of the photographs. He did not tell the court that the photographs must show anything beyond mere nudity. The trial court defined nudity using the statutory definition. O.R.C. 2907.01(H). (R. 120) It read O.R.C. 2907.323(A)(3) as imposing strict liability. It even defined "possession" in a way that did not require knowledge or notice of the character of the item possessed. (R. 120) Thus, like Shuttlesworth, Mr. Osborne did not have fair warning that his conduct could be criminal when he acted because O.R.C. 2907.323(A)(3) was being applied as written, and not as later construed on his own appeal by the Ohio Supreme Court.

Ohio Revised Code 2907.321 and 2907.322 regulate the possession of obscenity depicting minors and of sexually oriented materials depicting minors. One could not have predicted that a reviewing court would find prurient

appeal to be an element in O.R.C. 2907.323(A)(3), since those two sections govern sexually oriented materials. Under the rule of construction *in pari materia* the inference is that because O.R.C. 2907.323(A)(3) did not mention prurient interest, and other sections regulate obscene and sexually oriented depictions of children, it was not an element of O.R.C. 2907.323(A)(3). Thus, the Ohio Supreme Court's addition of a "prurient purpose" element was a surprising construction that one in Mr. Osborne's position could not anticipate.

A court, of course, may in many situations construe a criminal statute and apply the construction in the case at bar. But when it construes an overbroad statute that invades First Amendment rights to make it valid and applies that construction in the case at bar, that application is *ex post facto*. One who acted before the construction did not receive fair warning that his conduct might be criminal.

Mr. Osborne was convicted under an invalid statute. When he acted, he had no fair warning of what conduct was prohibited. His conviction cannot stand under the Ohio Supreme Court's new version of O.R.C. 2907.323(A)(3).

C. The Ohio Supreme Court Added New Elements To Ohio Revised Code 2907.323(A)(3) And Affirmed Mr. Osborne's Conviction On The Basis Of Them, Even Though Mr. Osborne Never Had A Hearing On, Or An Opportunity To Defend Against, Those Elements.

It is a violation of due process where, as in the case at bar, a state supreme court adds new elements to save a statute and then affirms the conviction, leaving the accused convicted on the basis of elements that were not in issue at his trial. When new elements are added after

conviction, the state has been excused from meeting its constitutionally required burden of proof, and the accused has been denied a hearing and the right to present a defense with the effective assistance of counsel.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970). In the case at bar, the trier of fact was not called upon to address the elements that were used by the Ohio Supreme Court to sustain the conviction. In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), Thornhill was convicted under a statute that prohibited "loitering and picketing." On appeal, the Alabama Supreme Court attempted no narrowing construction and affirmed. This Court reversed, finding no reason to determine "whether the evidence . . . could ever support a conviction founded on different and more precise charges. 'Conviction upon a charge not made would be a sheer denial of due process.'" *Thornhill*, 310 U.S. at 96, citing *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

Every criminal defendant must be given "a meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986); *California* v. *Trombetta*, 467 U.S. 479, 485 (1984); *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *In Re Oliver*, 333 U.S. 257, 273 (1948). When the accused is not notified of the elements of the offense at the time of trial, he is denied this opportunity. The Sixth Amendment as applicable to the states through the Fourteenth Amendment guarantees a person charged with a criminal offense notice of the charges against him and a hearing on those charges, with the effective assistance of counsel. Counsel cannot be effective when the elements of the crime are unknown to counsel at the time

of trial. When the trial court does not know the elements of the offense, fair determinations on the admissibility of evidence, appropriate jury instructions, the scope of voir dire and of argument cannot be made. See *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 92 (1965). When the accused does not know the elements of the charge, he cannot make rational decisions on, or assist in, his own defense.

In *Cole* v. *Arkansas*, 333 U.S. 196 (1948), Roy Cole was convicted under the second section of a two-part Arkansas penal statute. On review the Arkansas Supreme Court found the conviction not to be sustainable under the second section but affirmed it after finding that Cole had violated the first section, which prohibited substantially different conduct. This Court found a denial of due process since Cole had not had an opportunity to answer a charge under the first section:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole, 333 U.S. at 201.

Clyde Osborne is in a position similar to that of Cole. He has been convicted of a crime against which he had no opportunity to defend. As a result of the Ohio Supreme Court's re-writing of O.R.C. 2907.323(A)(3), Mr. Osborne was denied notice of the charge he faced and an opportunity to defend against it. Mr. Osborne was convicted, not by his jury, but in the closed chambers of the Ohio Supreme Court. Had Mr. Osborne known at the time of trial the age of minority, or that scienter was required, he might have made different decisions as to how to present his defense. Had he known that his possession required a

"prurient interest" and a purpose that was not "morally innocent," he could have asked the jury to decide that the evidence did not show that these elements were applicable to him. Had he known that "nudity" required a "lewd exhibition" or a "graphic focus on the genitals," he could have asked the jury to decide that the evidence did not establish that the state had met its burden of proof on these elements.

Since Mr. Osborne was not aware of the elements of the offense, he could not make a rational choice as to how to plead to the charge, and he could not make informed decisions about trial tactics. He was deprived of the effective assistance of counsel, for counsel did not know the nature of the charge. Therefore, his conviction cannot stand.

II. THE STATE MAY NOT PROHIBIT PRIVATE POSSESSION OF MATERIALS THAT DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSISTS OF A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Clyde Osborne was arrested, prosecuted, and convicted for possessing three Polariod photographs and one snap shot of a nude minor, which were seized from the drawer of a desk in the bedroom of Mr. Osborne's home during a search executed under a warrant. (R. 66) Mr. Osborne testified that he had been given the three Polaroid photographs and one snap shot in his home by a friend, Jack Smith. (R. 86, 88) There was no evidence that the photographs were commercially produced or distributed. All were kept in a photograph album that Mr. Osborne assembled for his personal use and had privately possessed for a number of years. (R. 86-87)

The state may not criminalize the private, in-home possession of photographs, regardless of their nature. "If the

First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969). The materials regulated by O.R.C. 2907.323(A)(3) as construed below are depictions of child nudity where the nudity consists of a "lewd exhibition" or "involves a graphic focus on the genitals." Whether or not these materials fall within a legitimate definition of child pornography, their private, in-home possession is protected by the First Amendment rights of privacy and to receive information. *Stanley*, 394 U.S. at 564.

The constitutional right to privacy has been recognized by this Court in many contexts. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562(1977); *Michigan* v. *Clifford*, 464 U.S. 287, 296 and n.7 (1984). The right to privacy in one's home is a fundamental guarantee of the Constitution. U.S. Const. amends. I, IV.

The First Amendment also protects the right to receive information. *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943). Every person has the right to think his own thoughts, seek his own information and come to his own truths. This right extends to information regardless of its worth. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). Unpopular ideas may not be suppressed merely because they are unpopular. *Kingsley International Pictures Corp.* v. *Regents of University of New York*, 360 U.S. 684, 688-89 (1959); *Cohen* v. *California*, 403 U.S. 15, 25 (1971). Offensive messages, so long as the means of communication are peaceful, "need not meet standards of acceptability." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

Because child pornography is not within the definition of obscenity as articulated in *Miller* v. *California*, 413 U.S. 15 (1973), it does not fall into any of the categories of materials whose content places them outside the reach of the First Amendment. Materials defined as child pornography are not necessarily obscene. *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). They are regulated even though they may have serious literary, artistic, political or scientific value. *Ferber*, 458 U.S. at 764. The purpose of their regulation is not to purge the marketplace of ideas of the information communicated, but to protect the young persons used in their production. As a consequence, the First Amendment right to receive information is more significantly invaded by a prohibition against possession of child pornography than by one against possession of materials that fall within the legal definition of obscenity.

In order to prohibit possession of non-obscene materials, the state must establish that it has a compelling interest which can be served in no less intrusive manner. *Shelton* v. *Tucker*, 364 U.S. 479 (1960). There is no need to prohibit private, in-home possession in order to stem the traffic in child pornography. The state's interest in regulating the production and sale of child pornography is to protect children from the harm suffered as a result of being posed in sexual conduct and of having the resulting depictions circulate in commerce. It is not necessary to invade the privacy of the home to protect that interest. The state's interest in stopping the trade in commercially produced child pornography is adequately served by regulating production, sale and distribution. This Court said in *Stanley:*

> [W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution.

> That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Stanley, 394 U.S. at 567-568.

The state's interest in regulating the private possession of child pornography is no greater than its interest in prohibiting the private possession of obscene materials. Possession without intent to sell is not a part of the production or distribution of child pornography. The harm of production has passed and distribution and circulation have ceased when the materials are privately possessed. Whatever message is conveyed by a depiction of unclothed minors, be it familial tenderness or sexual attraction, the state has no interest in suppressing that message in the privacy of the home. While controlling "the moral content of a person's thoughts . . . may be a noble purpose . . . it is wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 565-66.

Even if the state's interest in prohibiting possession of child pornography could outweigh First Amendment rights to private, in-home possession of such materials, the materials regulated by O.R.C. 2907.323(A)((3), as discussed in Part III below, are not child pornography because they do not depict sexual conduct and therefore do not pose the same threat to children's safety as does child pornography. The state's interest in prohibiting private, in-home possession of the materials regulated by O.R.C. 2907.323(A)(3) is less than its interest in prohibit-

ing child pornography and does not outweigh the First Amendment rights of privacy and to receive information.

Regardless of the presence or absence of constitutional protection for the contents of the photographs taken from Mr. Osborne's personal photo album, his right to possess and view those photographs and to reap whatever message they may yield cannot be infringed.

III. THE STATE MAY NOT, CONSISTENT WITH FIRST AMENDMENT RIGHTS OF SPEECH, PROHIBIT THE POSSESSION OR VIEWING OF MATERIALS WHICH DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSTITUTES A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Ohio Revised Code 2907.323(A)(3), as construed by the Ohio Supreme Court, prohibits the possession or viewing of depictions of nude children, where the nudity constitutes a lewd exhibition or involves a graphic focus on the genitals. (J.A. 42) As is discussed below:

A. This prohibition is overbroad because it encompasses materials protected by the First and Fourteenth Amendments.

B. It is not narrowly drafted to serve a compelling state interest that justifies an invasion of First Amendment rights.

A. Depictions Of Child Nudity, Where The Nudity Constitutes A "Lewd Exhibition" Or "Involves A Graphic Focus On The Genitals," Are Protected Speech.

The Ohio Supreme Court held that the materials regulated by O.R.C. 2907.323(A) are those depicting minors in a state of nudity where the nudity constitutes a "lewd exhibition" or "involves a graphic focus on the genitals."

(J.A. 42) It held that such depictions are "child pornography" and as such are unprotected by the First Amendment. (J.A. 42) The Ohio Supreme Court's decision expands the definition of child pornography into the area of protected speech.

Child pornography was defined in *New York* v. *Ferber*, 458 U.S. 747 (1982). It must "*visually* depict sexual conduct by children below a specified age." "Sexual conduct" must be defined and "some element of scienter" is required. It need not be obscene and need not appeal to prurient interest. *Ferber*, 458 U.S. at 764-65. The state's interest in regulating child pornography is "[t]o prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 754. It is "the nature of the harm to be combated" that defines the limits of child pornography. *Ferber*, 458 U.S. at 764. Child pornography must be produced for commercial purposes. *Ferber*, 458 U.S. at 759-761.

The *Ferber* definition of child pornography draws the line between protected and unprotected speech where depictions of children are involved. This Court noted in *Ferber* that child pornography is not necessarily without literary, artistic, political, or social value. *Ferber*, 458 U.S. at 761, 764. Child pornography, unlike other types of unprotected speech, need not be essentially worthless. It is not the content of child pornography that makes it unprotected. Child pornography is unprotected because of the state's compelling interest in protecting children. *Ferber*, 458 U.S. at 753. When materials depicting children do not involve sexual conduct and are not produced or distributed commercially, it no longer serves the state's interest in the protection of children to regulate the materials, and the materials then fall outside the very narrow categories of unprotected speech. The materials regu-

lated by O.R.C. 2907.323(A)(3) are not child pornography and are protected by the First Amendment.

As will be shown in the remainder of Sub-Part A, these materials are not child pornography because (1) they do not involve depictions of sexual conduct, and (2) they need not be produced, sold or possessed for commercial purposes.

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1. Ohio Revised Code 2907.323(A)(3) Prohibits Possession Or Viewing Of Materials That Do Not Depict Sexual Conduct.

Child pornography need not be obscene but must depict sexual conduct. *Ferber*, 458 U.S. at 765. The films that formed the basis for the prosecution in *Ferber* showed two boys masturbating. *Ferber*, 458 U.S. at 752. This Court approved New York's definition of acts of sexual conduct: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals," *Ferber*, 458 U.S. at 765, on the assumption that "the New York courts will [not] widen the possibly invalid reach of the statute by giving an expansive construction of the proscription of 'lewd exhibition[s] of the genitals.'" *Ferber*, 458 U.S. at 773.

The Court of Appeals in this case interpreted O.R.C. 2907.323(A)(3) to prohibit depictions of nudity that involve a "lewd exhibition of the genitals." (J.A. 28-29) The Ohio Supreme Court expanded that definition by dropping the requirement that genitalia be depicted. A "lewd exhibition" is all that the court required. To some, simple nudity may be a lewd exhibition. To others, a lewd exhibition may be a particular position or stance assumed by the photographic subject. The Ohio Supreme Court's requirement that the regulated depictions appeal to prurient interest adds nothing to the meaning of "lewd exhibition." The words "prurient" and "lewd" are equivalent and provide no guidance as to what may be depicted. What is certain, however, is that no sexual conduct is necessary. Possession of a depiction of a minor engaged in masturbation, bestiality or sexual activity with another person falls under the prohibitions of O.R.C. 2907.321 or 2907.322.

The phrase "graphic focus on the genitals" even more clearly fails to limit O.R.C. 2907.323(A)(3) to sexual conduct. It simply requires a photograph showing the genitals, presumably in such a way as to direct the viewer's attention to the genitals. This language relates to the camera focus or angle rather than the activity of the photographic subject. The films in *Ferber* showed masturbation. This Court's use of "lewd exhibition of the genitals" must be read in light of that fact. This Court did not indicate that a mere depiction of genitals, from whatever camera angle or with whatever focus, could constitute child pornography.

Ohio Revised Code 2907.323(A)(3) was not intended to regulate depictions of sexual conduct. As noted, companion sections of the Ohio Revised Code prohibit the possession of such materials. O.R.C. 2907.321; O.R.C. 2907.322. The Ohio Supreme Court's use of the phrases "lewd exhibition" and "graphic focus on the genitals" does not change the fact that the statute prohibits depictions of mere nudity. These phrases provide little guidance as to what photographs may be possessed without running the risk of prosecution.

2. Ohio Revised Code 2907.323(A)(3) Prohibits Possession Of Depictions That Are Not Produced, Distributed Or Possessed For Commercial Ends.

Ohio Revised Code 2907.323(A)(3) prohibits mere possession or viewing. The materials need not have been

created for a commercial purpose, nor need they be possessed or viewed for a commercial purpose. In *Ferber* this Court found commercial distribution to be "intrinsically related to the sexual abuse of children" that is involved in posing them for photographic depictions of sexual conduct. It noted that commercial distribution caused emotional harm, *Ferber*, 458 U.S. at 759 n. 10, and that the distribution network "must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ferber*, 458 U.S. at 759. It said that "the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials." *Ferber*, 458 U.S. at 761.

This Court thus viewed commercial distribution as exacerbating the sexual abuse involved in the production of child pornography and on that basis found that New York had a compelling interest in prohibiting its production. Ohio Revised Code 2907.323(A)(3), however, is not limited in application to commercial materials. It does not require that the materials be commercially produced or distributed. It does not require that the photographic subject be posed but covers candid photographs, even photographs taken without the subject's knowledge. It does not require that the possession be for a commercial purpose.

The photographs involved in this case are Polaroids and a snap shot. They were not produced commercially. Mr. Osborne did not acquire them commercially, and he did not possess them for a commercial purpose. They had been in Mr. Osborne's home for "four or five years." (R. 86) Non-commercial photographs which do not depict sexual conduct are not child pornography.

B. The Ohio Supreme Court's Construction Of Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Serve A Compelling State Interest.

A state must have a compelling interest when it legislates to limit First Amendment activity. The First Amendment needs "breathing space," and statutes restricting speech "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-612 (1973). Even when the state's purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the need can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Ohio Revised Code 2907.323(A)(3) as construed does not meet this test, because it is not narrowly tailored to serve a state interest which warrants the invasion of First Amendment rights. As will be shown in this Sub-Part B, (1) O.R.C. 2907.323(A)(3) does not serve a compelling state interest because it does not govern materials that depict sexual conduct, and the statutory exceptions in O.R.C. 2907.323(A)(3) allow possession in circumstances inconsistent with a goal of protecting children, and (2) it is not narrowly tailored to protect children because it prohibits mere possession and viewing of materials not inherently harmful to the children depicted.

1. Ohio Revised Code 2907.323(A)(3) Does Not Serve A Compelling State Interest.

This Court has carefully scrutinized rationales that assert the protection of minors as a justification for invading the First Amendment. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Smith, Judge* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979). The Ohio Supreme

Court said that O.R.C. 2907.323(A)(3) serves Ohio's interest in the protection of children. (J.A. 51) The statute as construed below does not serve that interest. Ohio Revised Code 2907.323(A)(3) was not intended to protect children from sexual abuse. Other statutes regulate materials that depict minors in an obscene way or engaging in masturbation, bestiality or sexual activity. O.R.C. 2907.321; 2907.322. No physical contact with the photographic subject is involved in the depictions regulated by O.R.C. 2907.323(A)(3). This remains true under the Ohio Supreme Court's construction. If any touching, including masturbation is depicted, prosecution would have to proceed under O.R.C. 2907.321 or O.R.C. 2907.322, which are specifically aimed at materials depicting such activities.

That O.R.C. 2907.323(A)(3) is not directed at eliminating child sexual abuse is evident from three exceptions to liability. First, liability is negated by parental consent to the production, possession, use or transfer of the regulated materials. Second, liability is negated where the possessor or viewer is the depicted child's parent. Third, liability is also negated by the fact that the possession is for an "artistic" purpose. However, in O.R.C. 2907.321 and O.R.C. 2907.322, the sections that regulate depictions of sexual conduct, liability is not negated by parental possession, parental consent, or artistic purpose, although those two sections, like O.R.C. 2907.323(A)(3), recognize a list of "proper purposes" based on legal, medical, scientific, or religious motives.

When it construed O.R.C. 2907.323(A)(3), the Ohio Supreme Court changed the character of the depictions regulated to those that are not "morally innocent," that appeal to "prurient interest" and involve "a graphic focus on the genitals" or constitute "lewd exhibitions." (J.A. 42)

The court did not eliminate the parental possession, parental consent, or artistic purpose exceptions. Under the court's construction, a parent's consent to the use of his child in lewd exhibitions which appeal to prurient interest negates liability for possession, use, or viewing of those materials. Lewd exhibitions of children may also be possessed by parents or for artistic purposes without criminal penalty. If the court's construction had successfully changed O.R.C. 2907.323(A)(3) to regulate only depictions involving sexual conduct, the parental possession, parental consent, and artistic purpose exceptions would make the construction more damaging than if there were no statute at all.

The exclusion of depictions possessed by parents, with parental consent, or for an artistic purpose makes O.R.C. 2907.323(A)(3) underinclusive. *Ferber*, 458 U.S. at 765. If the possession of the materials regulated were inherently harmful to the children depicted, there would be no justification for these exceptions. When the state asserts a compelling interest but enacts legislation that only partially serves that interest, the interest is not truly compelling. *Florida Star* v. *B. J. F.*, 491 U.S. ___, 109 S. Ct. 2603, 2612-2613 (1989). A statute "cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 109 S.Ct. at 2613 (Scalia, J., concurring in part and concurring in the judgment).

The state's interest in regulating child pornography is "safeguarding the physical and psychological well being of a minor." *Ferber*, 458 U.S. at 756-57. Child pornography harms its minor subjects through the sexual abuse and molestation which occurs in production, *Ferber*, 458 U.S. at 757-58, and through the psychological harm which results from the distribution and circulation of the mate-

rials in commerce. *Ferber*, 458 U.S. at 759-60. The materials regulated by O.R.C. 2907.323(A)(3), however, do not involve sexual conduct. They depict no sexual abuse or molestation of any child. Ohio Revised Code 2907.323(A)(3), unlike the New York statute in *Ferber*, does not require the posing of a child in a performance. The depiction may be a candid photograph, taken even without the knowledge of the child subject. There is no physical harm involved. The materials regulated by O.R.C. 2907.323(A)(3) are not limited to those commercially distributed or produced. They include, as in this case, snap shots and Polaroid photographs privately possessed for years. The psychological harm caused by commercial distribution and circulation is not addressed by O.R.C. 2907.323(A)(3). Ohio has no compelling interest in prohibiting the possession or viewing of such materials.

2. Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Protect Children.

When the state seeks to protect a compelling interest by regulating communicative materials, it must use the least restrictive means available to do so. *Shelton* v. *Tucker*, 364 U.S. 479 (1960). While Ohio has an interest in protecting its children from participation in physically and psychologically harmful photographic production, it may not sweep in protecting that interest so broadly as it has done in O.R.C. 2907.323(A)(3).

The materials regulated by O.R.C. 2907.323(A)(3) depict no sexual conduct and need not be commercially produced or circulated. They are not child pornography. There is no demonstrated connection between possession of such materials and any physical or psychological harm to the photographic subject. If the First Amendment is to be invaded, there must be a clear correlation between the

prevention of the abuse of minors and the infringement of First Amendment rights. More than mere speculation is required.

Even if the materials regulated by O.R.C. 2907.323(A)(3) were child pornography as defined in *Ferber*, regulation of private possession is not the least restrictive means by which to serve the state's interest. While commercial distribution is the essence of the child pornography industry, possession by a single individual who has no intention of distributing is quite different. Mere possession does not involve any physical abuse of the child depicted and necessarily means that circulation has stopped. A possessor is not part of the child pornography industry. Any transfer of child pornography that is privately possessed would be punishable under O.R.C. 2907.321 and O.R.C. 2907.322. It is not necessary to prohibit private possession to dry up the market in child pornography. This Court rejected such a justification regarding obscenity in *Stanley* v. *Georgia*, 394 U.S. 557, 568 (1969).

Ohio Revised Code 2907.323(A)(3), in addition to possession, prohibits viewing. A depiction prohibited by O.R.C. 2907.323(A)(3) might be on the screen of a drive-in theater, where passersby can see the screen. Thus, one who has no connection with the depiction might view it. Viewing is so remote from the production or distribution of child pornography that no state interest is served by prohibiting it. A viewer, like a possessor, is not part of the child pornography industry.

Ohio Revised Code 2907.323(A)(3), as construed by the Ohio Supreme Court, is unconstitutionally overbroad. It regulates materials that are not child pornography. It does not serve a compelling interest in protecting children

from exploitation in the child pornography industry. It violates First Amendment rights because it is not narrowly tailored to serve the state's interest in protecting children by the least restrictive means.

CONCLUSION

The Ohio Supreme Court affirmed Clyde Osborne's conviction under O.R.C. 2907.323(A)(3), a statute which was invalid for its invasion of First Amendment rights at the time Mr. Osborne was charged and tried. Because the statute was invalid, Mr. Osborne's conviction was invalid.

The Ohio Supreme Court attempted to save O.R.C. 2907.323(A)(3) by giving it a construction which added new elements to the offense. At the same time, the court held that Mr. Osborne's conviction under the invalid statute could stand under the new construction. Mr. Osborne's conviction should have been reversed regardless of whether the new construction saved O.R.C. 2907.323(A)(3). He did not have notice at the time he acted that his conduct was illegal. He did not have an opportunity at trial to defend against the elements of O.R.C. 2907.323(A)(3) as it was later construed.

Mr. Osborne was convicted for his private, in-home possession of depictions of nude minors. Every person has the right to read or look at whatever material he pleases in the privacy of his own home.

The Ohio Supreme Court failed in its effort to constitutionalize O.R.C. 2907.323(A)(3). The statute continues to regulate constitutionally protected materials. The court expanded the definition of child pornography to include depictions of nudity, which although lewd, do not portray sexual conduct and are not commercially produced or distributed. Even with this construction, O.R.C.

2907.323(A)(3) is not narrowly drafted to serve a compelling state interest. Moreover, it prohibits possession and viewing, acts which are not related to the activity of the child pornography industry. At variance with its purported goal of protecting children, it permits possession and viewing under three exceptions that belie Ohio's assertion of a compelling interest and render O.R.C. 2907.323(A)(3) underinclusive.

For the above reasons, Mr. Osborne requests that this Court reverse the judgment of the Ohio Supreme Court and order that court to discharge him and to dismiss all proceedings against him in this matter.

Respectfully submitted,

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